SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-397

WARREN LOUIE, dba "a Waterhole #1"
Petitioner,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,
Respondent.

Brief in Opposition to Petition for Certiorari

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DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,
Respondent.

Brief in Opposition to Petition for Certiorari

STATEMENT OF THE CASE

On October 17, 1973 an Accusation was filed against petitioner's retail liquor license. It alleged three different sales of liquor in violation of law. It further set out of the petitioner's license history showing other previous violations of the liquor fair trade laws.

The Accusation was served, petitioner filed a Notice of Defense, and a hearing was held all in compliance with the provisions of the California Administrative Procedure Act (Gov't Code 11500, *et seq.*). At the hearing petitioner offered no evidence whatsoever.

The proposed decision of the independent hearing officer found the charges true and recommended revocation. The Department adopted the decision, petitioner appealed to the Appeals Board and the decision was affirmed. The Court of

Appeals and California Supreme Court denied review; the Court of Appeals denied a stay and this Honorable Court denied a stay pending petition for certiorari.

It is our position that this case does not meet the requirements of Rule 19 in that: There are no substantial federal questions; petitioner failed to raise any issues of the Antitrust Laws below; the questions of State Law have been decided adversely to the petitioner.

ARGUMENT

I. The California Retail Price Maintenance Provisions Are Not in Conflict with Federal Law Nor Was This Issue Raised Below.

It should be noted that petitioner's present counsel did not represent him before the Department, the Appeals Board, or in seeking a writ of review.

We are sure counsel has acted in good faith but the Antitrust argument made here was not presented to the Department nor is it contained in petitioner's brief to the Appeals Board. In fact, petitioner presented no evidence before the Department whatsoever.[1]

Respondents submit therefore that the raising of such objections or issues is not timely, that the appellant has failed to exhaust its administrative remedies with respect thereto, and that the review of administrative decisions is confined to the issues appearing in the record of the administrative body as made out by the parties in said administrative proceedings (*Harris v. ABC Appeals Board,* 197 Cal. App. 2d 182, 187 (1961); *Epstein v. California Horse Racing Board,* 222 Cal. App. 2d 831, 835-836 (1963); and *Yen Eng v. Board of Building & Safety Commissioners* (1960), 184 Cal. App. 2d 514, 518).

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1. Attached as our Appendix "A" is petitioner's brief to the Appeals Board. The Appendix to the Petition contains the Department's decision and that of the Appeals Board.

As succinctly stated in *Bohn v. Watson*, 130 Cal. App. 2d 24, 37 (1954), hearing by Supreme Court denied:

> ". . . It is fundamental that the review of administrative proceedings provided by section 1094.5 of the Code of Civil Procedure is confined to issues appearing in the record of that body as made out by the parties to the proceedings, though additional evidence, in a proper case may be received. (citation) It was never contemplated that a party to an administraive hearing should withhold any defense then available to him or make only a prefunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court. (citation) The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play."

But even assuming, arguendo, that the appellant may now properly raise these issues before this Court, an examination of said issues reveals them to be without merit.

Both traditionally[2] and under the Twenty-first Amendment[3] the power of a state to regulate and control alcoholic beverages destined for use, distribution or consumption within its borders—including seizure or complete prohibition as well as any restriction falling short of prohibition

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2. Mugler v. Kansas, 123 U.S. 623, 657-671 (1887); Crowley v. Christensen, 137 U.S. 86, 91 (1890); Giozza v. Tiernan, 148 U.S. 657, 661-662 (1893); Cronin v. Adams, 192 U.S. 108, 114-115 (1904); Cox v. Texas, 202 U.S. 446, 451 (1906); Purity Extract Co. v. Lynch, 226 U.S. 192, 201 (1912); Seaboard Air Line Ry. v. North Carolina, 245 U.S. 298 (1917); Crane v. Campbell, 245 U.S. 304, 307 (1917); McCormick & Co. v. Brown, 286 U.S. 131, 140-141 (1932).

3. State Board of Equalization v. Young's Market, 299 U.S. 58, 63-64 (1936); Mahoney v. Triner Corp., 304 U.S. 401 (1938); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Ziffrin v. Reeves, 308 U.S. 132, 138 (1939); United States v. Frankfort Distilleries, Inc. 324 U.S. 293 (1945).

even if discriminatory in nature—has been almost unconditional.

Except for cases involving: (a) foreign commerce[4], (b) import-export[5], (c) interestate commerce in transit through the regulating state[6], (d) federal enclaves[7], and (e) possible intolerable burdens on interstate commerce outside of the regulating state[8], this Honorable Court has consistently denied certiorari or dismissed appeals for want of a substantial federal question in cases involving state regulation and control of alcoholic beverages destined for use, distribution or consumption within the state's borders.[9]

As set forth by this Honorable Court in *Seagram v. Hostetter*, 384 U.S. 35 at 41-43 (1966):

> ". . . The appellants attack #9 on many constitutional fronts. They contend that its provisions place an illegal burden upon interstate commerce, conflict with federal antitrust legislation and thus fall under the Supremacy Clause, and violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. We find all these contentions without merit.

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4. U.S. Const. Art. I § 8, cl.3; Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); Department of Alcoholic Beverage Control v. Ammex Warehouse Co., 378 U.S. 124 (1964).

5. U.S. Const. Art. I § 10, cl.2; Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964); Low v. Austin, 13 Wall. 29 (1871); and see Parrott & Co. v. San Francisco, 131 Cal. App. 2d 332, 280 P.2d 881 (1955).

6. Duckworth v. Arkansas, 314 U.S. 390 (1941); Carter v. Virginia, 321 U.S. 131 (1944); Gordon v. Texas, 355 U.S. 369 (1958).

7. Collins v. Yosemite Park Co., 304 U.S. 518 (1938).

8. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966). Cf. United States v. Frankfort Distilleries, 324 U.S. 293, 299 (1945).

9. California v. Washington, 358 U.S. 64 (1958), motion to file complaint denied; Hooper v. Duncan, 379 U.S. 27 (1964), appeal dismissed for want of a substantial federal question; Plaza Liquor Stores, Inc. v. City of Atlanta, 381 U.S. 914 (1965), cert. denied; Laird & Co. v. Cheney, 385 U.S. 371 (1966), appeal dismissed for want of a substantial federal question; Inman v. City of Miami, 389 U.S. 1048 (1968), cert. denied.

"Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' As this Court has consistently held, 'That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories.' (Citations) Just two terms ago we took occasion to reiterate that 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' (Citations)

"... the present case concerns liquor destined for use, distribution or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the State."

In *Indianapolis Brewing Co. v. Liquor Commission*, 305 U.S. 391, 394 (1939), this Court held that state alcoholic beverage control laws, even though discriminatory in nature, could not be considered as in violation of the due process clause of the Fourteenth Amendment. And to the same point see *Mahoney v. Triner Corp.*, 304 U.S. 401 (1938) and *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939).

In the case of *California v. Washington*, 358 U.S. 54 (1958), wherein the State of California sought to prevent the State of Washington from imposing discriminatory regulations on California wines being marketed in the State of Washington, this Court *refused* to hear the case, citing in its per curiam opinion: U.S. Constitution, Amend. XXI, § 2; *Indianapolis Brewing Co. v. Liquor Commission*, supra; *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395; *Mahoney v. Joseph Triner Corp.*, supra; and *State Board of Equalization v. Young's Market*, 299 U.S. 59.

Perhaps the most striking expression of the dominant role played by the Twenty-first Amendment with respect to state regulation of alcoholic beverages is that found in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 63-64 (1936):

> ". . . A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

Since possession and sale of alcoholic beverages are not inherent rights of citizenship nor proprietary rights,[10] and inasmuch as the Twenty-first Amendment constitutionally separates alcoholic beverages apart from all other commodities, this Court has held that the due process and equal protection clauses of the Fifth and Fourteenth Amendments are not controlling with respect to a state's regulation of alcoholic beverages within the state's borders.[11]

And particularly to the instant appeal and the issues the appellant seeks to raise concerning state regulations dealing with female employees on alcoholic beverages premises and the review procedures provided as to California Department of Alcoholic Beverage Control decisions, see the most recent decisions of this Honorable Court refusing review of, and dismissing appeals for want of a substantial federal question in, petitions and appeals involving such issues: *Corsetti v. Dept. of Alcoholic Beverage Control of the State of California*, No. 71-329 ....U.S..... (Dec. 20, 1971) *Keller v. California Dept. of Alcoholic Beverage Control* 400 U.S. 806 (1970); *Meacham dba "Barbary Coast" v. California Dept. of Alcoholic Beverage Control*, 393 U.S. 855 (1968); *Probro, Inc. v. Dept. of Alcoholic Beverage*

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10. Crowley v. Christensen, 137 U.S. 86, 91 (1890); Crane v. Campbell, 245 U.S. 304, 308 (1917).

11. U.S. Const., 21st Amendment; California v. Washington, 358 U.S. 64 (1958), and the authorities cited in footnotes 1 & 2, supra.

Control of California, 392 U.S. 855 (1968); and see *Derrington v. City of Portland* (Ore.) 451 P.2d 111, certiorari denied 396 U.S. 901 (1969).

In *La Rue v. State of California*, 409 U.S. 109 (1972), this Court once again recognized the vitality of the Twenty First Amendment and we submit the concept is dispositive here. Attempts to raise the Antitrust Laws to invalidate the fair trade laws in California are not new. They were rejected in *Allied Properties v. ABC*, 53 Cal. 2d 141 (346 P.2d 737) and *Wilke Holzheiser v. ABC*, 65 Cal.2d 349 (55 Cal. Rptr. 23 420 P.2d 735).

II. We Do Not Deal Herein with the Marketing of a Harmless and Ordinary Commodity Beneficial to the Public, Nor with Any Proprietary Right of the Appellant to Sell Any Such Products; We Deal Herein with the Sale of Liquor, with the Prevention and Control of Its Attendant Social and Economic Evils, and with Appellant's Mere Permit or Privilege to Sell Same.

Alcoholic beverages have long been recognized as constituting a dangerous commodity whose attendant social and economic evils require that its sale be permitted only under such conditions as will limit to the utmost its evils.[12]

Nor has the danger to public welfare from alcoholic beverages diminished in recent years. Recent reports and actions of the Legislature[13], the Governor [14], the State Department

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12. *Schaub's Inc. v. Dept. of Alcoholic Beverage Control*, 153 Cal. App. 2d 858, 866 (1957), hearing by Supreme Ct. denied; *Crowley v. Christensen*, 137 U.S. 86, 91 (1890).

13. § 427, Health & Safety Code (Stats. 1965, ch. 1431 §2).

14. Statement and Recommendations of Governor Brown submitted to the California Legislature, April 20, 1965;
Press Statement of Governor Brown in signing Senate Bill 1279 on July 15, 1965;
Message to the California Legislature, January 5, 1965.

of Public Health[15] and the State Department of Justice[16] clearly demonstrate that the use of alcoholic beverages has become California's number one health problem, is a major factor in both crimes and fatal traffic collisions in this State, results in immense losses on the California economic scene, is steadily increasing the costs of local, county and state governments, and causes unmeasurable destruction of social and moral values in California's families, children and individual citizens.

Thus, one finds that under the provisions of the Twenty-first Amendment to the United States Constitution and Article XX, section 22 of the California Constitution this State possesses almost unlimited power and complete jurisdiction as to the prohibition, restriction, control and regulation of alcoholic beverages destined for use, distribution or consumption within its borders[17], and that alcoholic bev-

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15. "Prevention, Treatment and Control of Alcoholism in California" State Department of Public Health, Berkeley, 1965, pp. 7-8.

16. "Adult Criminal Detention", Bureau of Criminal Statistics, State Department of Justice, Sacramento, 1965. A recently completed pilot study of the inmate county jail population of five central California counties (San Francisco, Contra Costa, San Joaquin, Stanislaus and Tuolumne) showing that drunk and disorderly conduct commitments—exclusive of drunk driving commitments—make up the majority of all prisoners serving sentences in each of said county jails except Contra Costa where said commitments —exclusive of drunk driving commitments—are second in number only to traffic offense commitments.

17. U. S. Const., XXI Amend.; Calif. Const., art. XX, § 22; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964); *California v. Washington*, 358 U. S. 64 (1958); *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945); *State Board of Equalization v. Young's Market*, 299 U. S. 58, 63-64 (1936); *Ziffrin v. Reeves*, 308 U. S. 132, 138 (1939); *Mahoney v. Triner Corp.*, 304 U. S. 401 (1938); *Indianapolis Brewing Co. v. Liquor Commission*, 305 U. S. 391, 394 (1939); *Washington Brewers Institute v. United States*, 137 F. 2d 964 (9th Cir. 1943),

erages occupy a singular and legally unique position within the ambit of state regulation and control of business and commerce, and constitute a commodity whose legal status is sui generis as to all other commodities being sold in the market place.

Consistent with the recognition of alcoholic beverages as a dangerous commodity involving the health, welfare, safety and morals of the public—and the sale of which the State may either prohibit or restrict under such conditions and regulations as it may deem proper—is the equally well established principle that the legal status of an alcoholic beverages licensee is no more than that of a mere permit or privilege holder.[18]

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cert. denied 320 U. S. 776; *Wylie v. State Board of Equalization*, 21 F. Supp. 604, 605-606 (U. S. D. C. Calif. 1937); *Allied Properties v. Department of Alcoholic Beverage Control*, 53 Cal. 2d 141, 147 (1959); *Dave's Market v. Department of Alcoholic Beverage Control*, 222 Cal. App. 2d 671 (1963), hearing by Supreme Court denied (1964); *Sandelin v. Collins*, 1 Cal. 2d 147, 153 (1934).

18. "Unlike the rule with respect to the right to deal in ordinary commodities considered in the numerous cases cited and relied on by respondent, there is no inherent right in a citizen to sell intoxicants (citations); and a license to do so is not a proprietary right within the meaning of the due process clause of the Constitution (Const. art. I, § 13), nor is it a contract (citation); it is but a permit to do what would otherwise be unlawful . . ." *State Board of Equalization v. Superior Court*, 5 Cal. App. 2d 374, 377 (1939), hearing by Supreme Court denied.

". . . 'It has long been uniformly held that there is no inherent right in a citizen to engage in the business of selling alcoholic beverages (citations), and that "The regulation of that business is governed by legal principles different from those which apply to what may be termed inherently lawful avocations." The governing authority may, therefore, in the exercise of the police power for the protection of the public morals, health and safety, grant the *privilege* of selling alcoholic beverages upon such terms and conditions as it may determine. (citations)" *Kirchhubel v. Munro*, 149 Cal. App. 2d 243, 247-248 (1957), hearing by Supreme Court denied; *Schaub's Inc. v. Department of Alcoholic Beverage Control*, 153 Cal. App. 2d 858, 869-870 (1957), hearing by Supreme Court denied. And see *Sibert v. Department of Alcoholic Beverage Control*, 169 Cal. App. 2d 563, 566 (1959).

As concisely set forth by Mr. Justice Peters in speaking for the court in *Cooper v. State Board of Equalization*, 137 Cal. App. 2d 672, 679 (1955):

> "Appellants next contend that the statutes involved are unconstitutional in that they permit the deprivation of a valuable property right without due process. Of course a liquor license has certain attributes of property. It certainly has value and is sold commercially. But it is the type of property which the state, under the police power, has the power to control and regulate. The proper rule was stated in Kaname Tokaji v. State Board of Equalization, 20 Cal. App. 2d 612, 614 (67 P. 2d 1082), as follows: 'It is well settled that the right to possess, make or deal in intoxicating liquor is not a privilege, nor such a property right that state legislation prohibiting, restricting or regulating its manufacture, use, possession, distribution or sale violates the Fourteenth Amendment of the federal Constitution. (Citations.) Regarding this subject it was recently declared: "Unlike the rule with respect to the right to deal in ordinary commodities . . . there is no inherent right in a citizen to sell intoxicants . . . and a license to do so is not a proprietary right within the meaning of the due process clause of the Constitution . . . It is but a permit to do what would otherwise be unlawful, and consequently, a statute authorizing its revocation does not violate the due process clause . . ." ' (Citations.)

Lastly we would note that the Legislature has declared in section 23001 of the Alcoholic Beverage Control Act that the control and regulation of the sale of alcoholic beverages is "for the protection of the safety, welfare, health, peace and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages."

And that "(i)t is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes."

And in interpreting the aforesaid section, our appellate courts have held that it is "(t)he 'economic' welfare which will be achieved by strict regulation and curtailment of the use of liquor and the economic benefits resulting to the people from the promotion of temperance, rather than those resulting from the promotion of the liquor industry which is meant by such section."[19] Yet California nevertheless gives its licensees all the procedural protections contained in Govt. Code 11500 et seq.

III. Selling Liquor at Cut-Rate and Bargain Prices Below the Mandatory Minimum Consumer Prices Is Violative of the Alcoholic Beverage Control Laws and Contrary to Public Welfare and Morals.

That the regulation and control of the sale of alcoholic beverages vitally involves public welfare and morals is evident not only from the federal constitutional recognition of same patent in the unmatched, unparalleled and extraordinary scope of state power and control provided for by the Twenty-first Amendment, but is also clearly manifested in the special state constitutional provisions dealing with alcoholic beverages[20], the establishment by the people of a special constitutional state agency empowered to protect public welfare and morals in connection with the sale of

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19. *Duke Molnar Liquor Co. v. Martin*, 180 Cal. App. 2d 873, 880 (1960), hearing by Supreme Court denied; *American Distilling Co. v. State Board of Equalization*, 144 Cal. App. 2d 457, 462 (1956).

20. Calif. Const., Art. XX, § 22.

alcoholic beverages, judicial decisions imposing a "strict liability" on those who exercise the privilege of selling alcoholic beverages[21], and the statutory declaration of the Legislature in which the control and regulation of the sale of alcoholic beverages is declared to involve "*in the highest degree the economic, social and moral well-being and the safety of the State and of all its people.*"[22]

Turning to the mandatory minimum consumer price controls for liquor, one finds that following the end of Prohibition, the easing of the depression years and the return to a more prosperous buying public in the late thirties, the State Board of Equalization in 1939—acting under the powers conferred upon it by Article XX, section 22 of the State Constitution, and in order to prevent both the excessive purchasing of liquor by consumers and the disorderly marketing conditions resulting from cut-rate bargain sales and price wars—placed liquor under mandatory minimum consumer price controls[23], and enforced same through disciplinary actions from 1939 to March of 1944. In 1944 the Board suspended the operation of the mandatory minimum consumer price controls inasmuch as World War II conditions at that time (liquor shortage and

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21. *Morell v. Department of Alcoholic Beverage Control*, 204 Cal. App. 2d 504, 513 (1962), hearing by Supreme Court denied; *Munro v. Alcoholic Beverage Control Appeals Board*, 154 Cal. App. 2d 326, 329 (1957), hearing by Supreme Court denied; *Mercurio v. Department of Alcoholic Beverage Control*, 144 Cal. App. 2d 626, 630-631, hearing by Supreme Court denied; *DeMartini v. Department of Alcoholic Beverage Control*, 215 Cal. App. 2d 787, 815 (1963), hearing by Supreme Court denied; *Benedetti v. Department of Alcoholic Beverage Control*, 187 Cal. App. 2d 213, 218 (1960); *Givens v. Department of Alcoholic Beverage Control*, 176 Cal. App. 2d 529 (1959); and *Swegle v. State Board of Equalization*, 125 Cal. App. 2d 432 (1954).

22. Section 23001, Alcoholic Beverage Control Act (Bus. & Prof. Code), emphasis added.

23. Rule 42, State Board of Equalization, 1939.

O.P.A. ceiling prices) had removed cut-rate bargain sales and price wars from being a practical problem in liquor control.[24].

With the end of World War II, and the subsequent ending of the liquor shortage and O.P.A. price controls, the mandatory minimum consumer price system for liquor was reinstated by the State Board of Equalization on March 1, 1947, under its renumbered Rule 99[25].

Following the launching of a legal attack upon the reasonableness and validity of the State Board's position and action in making minimum consumer price controls mandatory for liquor, and during the pendency of said litigation[26], the 1947 Legislature immediately espoused, supported and reinforced the State Board's position and action by adding to it the weight and support of the Legislature's concurring determination that the protection of public welfare and morals requires the prevention of disorderly marketing conditions and cut-rate bargain sales and price wars in the marketing of liquor to consumers and, by enacting section 55.6 of the former Alcoholic Beverage Control Act[27], made minimum consumer price controls for liquor compulsory by legislative mandate as well as by State Board rule.

Said mandatory minimum consumer price controls have remained in effect under State Board of Equalization and

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24. Rule 42, State Board of Equalization, (1939-1940); renumbered as Rule 22 (1941-1944); renumbered as Rule 99 (1945). Rule suspended on March 9, 1944 by order of the State Board of Equalization. See Rule 99, State Board of Equalization, Title IV, Calif. Admin. Code, 1945.

25. Section 99, Title IV, Calif. Admin. Code, 1947 Register No. 7.

26. *Nelson v. Reilly*, 88 Cal. App. 2d 303 (1948).

27. Stats. 1947, ch. 657, p. 1698.

Department of Alcoholic Beverage Control rules, and subsequent legislative enactments, to the present moment.[28]

Thus, for some thirty-six (36) years (1939-1975), first by a constitutional agency's action alone (1939-1947),[29] and then by the combined action of the constitutional agency and the Legislature (1947-1975), mandatory minimum consumer price controls for liquor have been part of the alcoholic beverage control laws of this State.

Noteworthy also is that the Legislature in 1961 re-emphasized the involvement of public welfare and morals in the mandatory minimum consumer price controls for liquor by setting forth in section 24749[30] of the Alcoholic Beverage Control Act that:

> "It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination."

And in 1963, the Legislature still further emphasized the importance of the mandatory minimum consumer price con-

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28. Section 99, Title IV, Calif. Admin. Code, 1966; section 24755, Alcoholic Beverage Control Act. (Bus. & Prof. Code).

29. Except from March, 1944 through 1946, when the minimum consumer price controls were suspended during the period of a liquor shortage.

30. Stats. 1961, ch. 635.

trols to public welfare and morals by enacting section 23053.5[31] of the Alcoholic Beverage Control Act whereby special, additional annual license fees are imposed on liquor retailers, wholesalers and manufacturers to provide additional funds for more adequate and strict enforcement of the mandatory minimum consumer price laws.

The Supreme Court declared in *Allied Properties v. Department of Alcoholic Beverage Control*, 53 Cal. 2d 141, 145-149 (1959) that the Legislature's and the Department of Alcoholic Beverage Control's mandatory minimum consumer price requirements for liquor were valid in that the prevention of disorderly marketing conditions in the sale of alcoholic beverages and the removal of some of the factors which may lead to intemperance were legitimate public welfare and morals objectives, and that the prevention of price-cutting, bargain sales and price wars in the retail sale of liquor were reasonable means to obtain the elimination of some of the causes of said evils.

The aforesaid determination has been fortified by subsequent appellate decisions[32]—upholding the suspensions and revocations of the liquor selling privileges of those licensees who, by making unlawful cut-rate bargain sales of liquor in total disregard of the mandatory laws under which their privilege to sell liquor must be exercised, have insisted upon placing their own financial gain and competitive posi-

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31. Stats. 1963, ch. 1026.

32. *DeMartini v. Department of Alcoholic Beverage Control*, 215 Cal. App. 2d 787 (1963), hearing by Supreme Court denied; *Dave's Market v. Department of Alcoholic Beverage Control*, 222 Cal. App. 2d 671 (1963), hearing by Supreme Court denied (1964); *Cohon v. Department of Alcoholic Beverage Control*, 218 Cal. App. 2d 332 (1963); and *United Liquors v. Department of Alcoholic Beverage Control*, 218 Cal. App. 2d 450 (1963). And see also *Peck's Liquors v. Superior Court*, 221 Cal. App. 2d 772, 780-781 (1963), hearing by Supreme Court denied.

tion over and above the welfare and morals of their fellow citizens.

The mandatory exclusion of cut-rate bargain sales and price wars prevents: (1) the disruption of the orderly sale and distribution of liquor, and (2) curbs factors leading to the intemperate use of liquor by suppressing the excessive purchases of liquor that result from the bargain sales of, and price wars between, the major known brands (and to a lesser extent the unknown brands) of liquor which enjoy a great degree of public acceptance[33] in the alcoholic beverage market.

We submit therefore that appellant's conduct in deliberately and repeatedly making cut-rate and bargain sales of liquor to consumers at prices below the mandatory minimum consumer prices was and is contrary to public welfare and morals and thereby good cause under Article XX, section 22 of the State Constitution for the suspension or revocation of its privilege to sell liquor.

Finally, before leaving this area of interrelationship between public welfare and morals, the State's social and economic policies, the prevention of disorderly marketing conditions and the promotion of temperance in the sale of liquor, and the mandatory minimum consumer price controls being the means chosen by the State to achieve such ends—respondents would note that while this licensee as well as large individual and corporate licensees with multiple retail outlets in this State have continually argued and urged upon the *courts* that the mandatory minimum consumer price laws should be struck down by the *courts* as not being in the best interest of the public in that said price control laws are contra to that *economic policy* of our

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33. See *Borden Co. v. Federal Trade Commission*, 339 F. 2d 133 (5th Cir. 1964).

free enterprise system which calls for free and vigorous competition in the market place with the resultant economic benefits to the buying public of lower prices and greater buying power, such reasoning consistently ignores that we are dealing here with a dangerous commodity and with the overriding social and economic policies concerning the prevention and control of its attendant evils.

And while this licensee and large chain licensees would undoubtedly savour the striking down of price controls on liquor whereby they would be free to set their own prices and engage in price wars and ruinous competition against the small individual retail liquor licensees, the "mom and pop" liquor stores and the neighborhood corner grocery store, with the resultant competitive attrition of the small business licensees accruing to their competitive and financial position while at the same time increasing their financial gain by greater volume selling of liquor through cut-rate bargain prices; it remains a well established and fundamental judicial canon long adhered to by the federal courts[34]

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34. *Nebbia v. New York*, 291 U.S. 502, 537 (1933):

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' (Citation.) And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to

that it is not within the province of the courts to weigh the desirability of the social or economic policies adopted by a state to promote and protect public welfare and morals, nor to choose between competing policies, and that the wisdom of the policy adopted, and the adequacy of practicability of the means chosen to achieve same, are outside the judicial orbit.

IV. Given Petitioner's Previous Record, the Filing of an Accusation with Three Sales Included Was Not a Violation of Law.

In 1972, facing the fact that violations were continuing despite the heavy fines that could be imposed, the Legislature amended Business and Professions Code section 24755.1 to return to the Department the power to revoke licenses of those who make three sales in violation during a 3-year period. It was under this statute as amended that

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forward it, the courts are both incompetent and unauthorized to deal."

Heart of Atlanta Motel, Inc. v. United States, 379 U. S. 241, 255 (1964);

United States v. Frankfort Distilleries, 324 U. S. 293, 301 (1945);

". . . If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price fixing in order to discourage the temptations of cheap liquor due to cut-throat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it."

Washington Brewers Institute v. United States, 137 F. 2d 964, 968 (9th Cir. 1943) cert. denied 320 U. S. 776:

". . . the broad theory of the Sherman Act—that trade should be free of artificial restraints—is in many respects incompatible with the policy of state liquor-control legislation; and wherever such conflicts exist the Sherman Act must give way, just as the commerce clause itself gives way in identical circumstances. Where invocation of that Act tends to hamper or interfere with the enforcement of state laws regulatory of the transportation or importation of intoxicants, the Act is unenforceable."

And see *Thain v. City of Palo Alto,* 207 Cal. App. 2d 173, 187 (1962), hearing by Supreme Court denied; *Wadley v. County of Los Angeles,* 205 Cal. App. 2d 668, 671 (1962).

petitioner made the unlawful sales and the discipline imposed.

Prior to that time, the Legislature, in attempting to have the law obeyed, provided that fines immediately payable after a Department decision might work better. The case of *Walsh v. Kirby* (1974), 13 Cal. 3d 95 explains this in greater detail. *Walsh* held that where there were no priors, the Department should not accumulate violations before filing charges because this practice could constitute a de facto revocation of an unwitting violator. The decision dealt with the statute *before* the amendment and specifically pointed out:

> "We do not express any view whether departmental conduct similar to that in the instant case would be arbitrary if exercised against a licensee who, the record would show, was an habitual offender and unwilling to conform. (See *Dave's Market, Inc. v. Dept. of Alcoholic Beverage Control* (1963), 222 Cal. App. 2d 671, 680 [35 Cal. Rptr. 348].)"

The prior accusations and decisions against petitioner showed he had to have full knowledge before the violations at issue occurred. Despite this knowledge, he persisted in making these sales. Thus, as *Dave's Market v. ABC* (....) 222 Cal. App. 2d 671 held, consideration of his prior record was entirely proper. It is a *sale,* not a fully litigated violation, which is significant. The last sentence of Business and Professions Code section 24755.1 provides:

> "Each sale in violation of Section 24755 shall constitute a separate violation."

If consideration could not be given until all appeals had been exhausted, the practical effect would prevent three

violations ever occurring within three years and revocation would never be possible.

Witness the present case. The present Accusation was served in November 1973, the California Supreme Court denied hearing in June 1975. If petitioner's theory is accepted, the Department could now impose a $250.00 fine or 10-day suspension and file a new charge eventually imposing, in another 17 months, a possible $1,000 fine or 30-day suspension.

Business & Professions Code section 24755.1 clearly provides that three sales are grounds for revocation. The prior charges placed him on notice of the Fair Trade laws. Nothing more under *Walsh* is required.

V. Petitioner Was Not Declared "an Habitual Offender" Without a Prior Hearing.

Petitioner argues that he has a right to notice and a hearing on *whether he is an habitual offender* before the Department can allege more than one count in an Accusation. Such a proposition fails to consider that on all the previous Accusations petitioner had a right to a full notice and hearing (Gov. Code § 11500 et seq.); that he took advantage of them and, moreover, appealed every adverse decision.

At the hearing in this matter he had a right to litigate the issue in that such an inference led directly to the revocation. Thus he had a hearing and he had notice.

What petitioner is really stating is this: the State must prove he is a persistent violator before it is allowed to prove he is a persistent violator.

VI. Respondent Was Not Required to Prove Petitioner Had Actual Notice of the Minimum Price Schedules.

There is no requirement that a licensee receive actual notice of the minimum retail price schedules.

Reimel v. ABC Appeals Bd., et al. 256 Cal. App. 2d 158 (1965) 64 Cal. Rptr. 26. Title 4, California Administrative Code 99.2(a).

Samson Market v. ABC Appeals Bd. (1969) 71 Cal. 2d 1215, 1220 fn. 3.

The law places upon the licensee the duty to stay aware of the schedules and provides various means for doing so. See for example, Title 4, California Administrative Code section 99.2(e). Since the prices are contained in various easily obtainable periodicals, the burden is not a heavy one.

VII. The Previous Charges Were Not Improperly Considered.

Petitioner seems to suggest that the prior violations could not be considered for any purpose until all appeals had been exhausted. They clearly could be considered to show knowledge of the Fair Trade laws.

See *Dave's Market v. ABC Appeals Bd.* (1963) 222 Cal. App. 2d 671.

The three sales necessary to impose a revocation are contained in the very Accusation here in issue—the others simply helped prove knowledge and intent.

In any event, there is no real requirement that all appeals be exhausted before an offense constitutes a "conviction."

57 Ops.Cal.Atty.Gen. 374 (1974) exhaustively analyzed the various authorities in holding that a jury verdict and District Judge ratification sufficed to forfeit the second highest office in this State. It would appear, therefore, that petitioner is not in a position to really complain since the priors were pleaded in the Accusation and therefore placed in issue.

CONCLUSION

It is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General

STEPHEN L. PORTER
Assistant Attorney General

MATTHEW P. BOYLE
Deputy Attorney General

(Appendix follows)

Attorney for Appellant.

Before the Alcoholic Beverage Control Appeals Board of the State of California.

In the Matter of the Accusation against WARREN LOUIE, DBA: Water Hole # 1 366 - 8th Street Oakland, Ca. Off-Sale General License under the Alcoholic Beverage Control Act.	AB - 4134 File No. 19501 Reg. No. 18934

APPELLANT'S OPENING BRIEF

On Appeal from the Decision of The Department of Alcoholic Beverage Control, dated December 19, 1974, JEROME P. HERST, Hearing Officer.

STATEMENT OF THE CASE

This is an appeal from the decision of the Department of Alcoholic Beverage Control, dated December 19, 1974, Jerome P. Herst, Hearing Officer, whereby appellant was found in violation of Section 24755 of the Business and Professions Code (B & P) under Counts I, II and III, for which the penalty of revocation of the license was imposed in accordance with Section 24755.1 B & P.

STATEMENT OF FACTS

By accusation filed on or about October 17, 1973, appellant was accused of selling distilled spirits on three counts at a price less than "fair trade" price.

At the hearing of said accusation on March 26, 1974, the Department called one witness, namely, William Elledge, a

special investigator for the Department, who testified that he made purchases of distilled spirits from the Water Hole # 1, 366 - 8th Street, Oakland, California, on October 4, 11 and 26, 1973; that he was a peace officer (R.T. 12:14-16); that he did not advise the clerks or the sales person that they were violating the law (R.T. 14:18-20); that there were no other identifying marks on the bottles offered into evidence, except the manufacturer's label and the markings of the investigators (R.T. 18:18-24); that they did not receive any sales tag or cash register receipt for the purchases (R.T. 5:27-28); that he was provided with money to make purchases (R.T. 17:5-10); that they did not retain the change for evidence (R.T. 17:24-27). No other witnesses were called to corroborate Elledge.

The Department offered into evidence certified copies of the Distilled Spirits Minimum Retail Price Schedules on file with the Department, and the Department submitted its case.

Appellant submitted its case without further evidence.

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POINTS ON APPEAL

I. THERE IS NO SUBSTANTIAL EVIDENCE IN THE LIGHT OF THE WHOLE RECORD TO SUPPORT THE FINDINGS OF THE HEARING OFFICER AND HENCE, NO FINDINGS TO SUPPORT THE DECISION OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL.

II. THE DEPARTMENT HAS ACTED IN EXCESS OF ITS JURISDICTION AND HAS NOT ACTED IN THE MANNER REQUIRED BY LAW.

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ARGUMENT

I.

There is no substantial evidence in the light of the whole record to support the findings of the Hearing Officer and hence, no findings to support the decision of the Department.

(a) In every prosecution of such violations, there is one element in common, and that is, that purchases were made by investigators of the Department. The same was true in the case at bar; and further, the testimony of each of the investigators was not corroborated by any other investigator. However, it is also abundantly clear that more must be shown by the Department, and we quote from 2 Cal. Jur. 2d 248, Sec. 145, and the cases cited thereunder:

> "While disciplinary proceedings involving the revocation or suspension of licenses are not criminal in nature, all intendments are in favor of the accused and the charges against him must be proved by clear and convincing evidence before the right to engage in the licensed profession or business may be taken away."

Taking the recent case of *Gourmet, Inc.*, AB-3565, File No. 58901, Reg. No. 9657, page 5, decided December 21, 1972, as a typical example as to what constitutes sufficiency of evidence, not only the testimony of the investigators is necessary, but also, evidence of publication and/or mailing of "fair trade" prices filed with the Department, as well as cash register receipts showing the sale at less than "fair trade" prices.

* * *

It is clear that except for the uncorroborated testimony of the investigator and the "unmarked" bottles of liquor offered into evidence, there were no cash register receipts offered into evidence showing the sales at less than "fair trade"; no evidence whatsoever offered to show that the "fair trade"

price lists or schedules were published in the trade journals or mailed to the licensee, as required under Sec. 24755(j) B & P, and in accordance with the decision announced in *Kirby v. ABC App. Bd.* (1966), 71 C. 2d 1200. Although the filing of the "fair trade" price lists or schedules was made "constructive notice" to all persons affected thereby by amendment of said section in 1966 (Sec. 24755(e)), it was left intact in Sec. 24875 (wine), as well as Sec. 24755(j). There is no rational reason why one section was made "constructive notice" and the other made mandatory publication and/or mailing. In accordance with due process and a sense of fair play, constructive notice cannot be made sufficient to prove a criminal or quasi-criminal charge. Due process requires actual notice to be proven.

There was no evidence that the "fair trade" price lists offered into evidence were, in fact, in effect on the date of each alleged violation, in view of the provisions of Sec. 24755(d) B & P, providing for changes upon 15 days' notice, and requiring additional publication and/or mailing of said changes. Although said documents were certified as genuine copies on file in the Department, it does not, however, certify that the various stamps and entries made by the Department were genuinely made because of changes made by the various applicants and on the dates said documents seem to imply.

II.

The Department has acted in excess of its jurisdiction and has not acted in the manner required by law.

* * *

In the 1972 session of the State Legislature, Section 24755.1 of the Business and Professions Code was amended to provide for suspensions and revocations, as well as monetary penalties, effective March, 1973.

During the period July 18, 1973 to October 26, 1973, a period of a little over three months, the Department by its agents, and in accordance with its preconceived plan or scheme to put appellant out of business, filed three accusations, including the present one being appealed from, as follows:

July 26, 1973, for a violation dated July 18, 1973: penalty of 10 days' suspension imposed. Appeal pending.

September 19, 1973, for two violations, August 29, 1973 and September 12, 1973: penalty of 30 days' suspension imposed. Appeal pending.

And the present accusation filed October 17, 1973 for three violations, October 4, 1973, October 11, 1973 and October 26, 1973: penalty of revocation imposed.

The Department, at all times, knew that prior accusations had been filed against appellant and that all of said accusations are still pending on appeal. But apparently frustrated in its previous attempts to put appellant out of business, under the old law, by accumulating violations which the Supreme Court has recently declared as an abuse of discretion and as not proceeding in a manner prescribed by law (*Walsh v. Kirby*, Sup. 118 Cal. Rptr. 1), the Department, proceeding under the new law, has once again "accumulated" violations in order to revoke appellant's license.

Certainly, on its face, the Department seems to have followed the letter of Section 24755.1 B & P; but taking into consideration the prior relation of the Department and appellant, it is readily apparent that the present accusation is the culmination of the Department's preconceived plan or scheme to put appellant out of business. Once again, Mr. Elledge, the investigator, who made prior investigations of appellant, deliberately failed to advise appellant or his employees of the new law which carried with it pen-

alties including suspension and revocation. The short period during which the violations occurred, or were accrued by the Department, did not afford appellant sufficient warning of the penalty of revocation on the third accusation.

The principles enunciated in *Walsh v. Kirby, supra,* are equally applicable in this case in the light of the whole relationship between the Department and appellant.

* * *

CONCLUSION

In conclusion, the decision of the Department, imposing the penalty of revocation on appellant, should be reversed for the reason that there is no substantial evidence in the light of the whole record to support the findings of the Hearing Officer and hence, the decision of the Department, that the Department abused its discretion and had not acted in the manner required by law.

For the foregoing reasons, appellant respectfully prays that the decision of the Department being appealed from be reversed and that the accusation against appellant be hence dismissed.

Dated: March 13, 1975, at Oakland, California.

RAYMOND D. LOUIE
Attorney for Appellant.

PROOF OF SERVICE BY MAIL—
CCP 1013a, 2015.5

I declare that:

I am (a resident of/employed in) the county of Alameda, California.

I am over the age of eighteen years and not a party to the within cause; my business address is: 411 Central Building, 436-14th Street, Oakland, California 94612.

On March 13, 1975, I served the within Appellant's Opening Brief on the Respondent in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as follows:

L. Stephen Porter, Deputy Attorney General
6000 State Building
San Francisco, Ca. 94102

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on March 13, 1975, at Oakland, California.

A. M. WOTTON A. M. Wotton